In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-578

BRUCE W. BUBLICK, A WITNESS BEFORE THE JULY 1972 GRAND JURY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 28, 1972, petitioner appeared before the July 1972 federal grand jury in the Northern District of Illinois in response to a subpoena duces tecum. The subpoena, addressed to "Bruce W. Bublick Ltd., or any Authorized Officer or Agent", called for the production of "corporate minute books, bank statements, cancelled checks, deposit slips and check ledgers for the period from April 30, 1970 to and including the present" (Pet. App. 5, p. 20).[1] Bruce W. Bublick Ltd.

[1] The grand jury was inquiring into possible mail fraud violations.

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is a professional service corporation organized under the laws of Illinois and petitioner, an attorney, is the sole incorporator, director and shareholder of the corporation. He declined to produce the materials claiming that to do so would violate his Fifth Amendment privilege against compulsory self-incrimination.[2]

Petitioner was then brought before the district court pursuant to the government's motion for an order to direct compliance with the grand jury subpoena. After hearing arguments and taking evidence, the district judge, on August 31, 1972, ordered petitioner to comply, ruling that the documents of the corporation sought in the subpoena were not subject to an invocation of the Fifth Amendment privilege by petitioner. That same day petitioner was taken again before the grand jury and ordered to produce the corporate documents as required by the district court's order. He produced the corporate minutes but persisted in refusing to produce any of the other documents sought. The government then moved that petitioner be held in contempt for his failure to obey the court's order. The district judge, after hearing arguments, determined that petitioner was in contempt and directed that he be "committed to the custody of the United States Marshal for the Northern District of Illinois until such time as [petitioner] shall obey said order, or until such time as the July 1972 Grand Jury shall be discharged from further service, whichever is sooner" (Pet. App. 1, p. 2).

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[2] No question of attorney-client privilege is presented by the facts of this case.

The court of appeals entered a stay of the district court's order. Thereafter on September 8, 1972, within the time provided by 28 U.S.C. 1826(b), it affirmed the adjudication of contempt, holding that "for purposes of determining whether the privilege against self-incrimination attaches to the appellant's refusal to produce documents and records, the professional service corporation is to be treated as any other corporation" (Pet. App. 2, p. 4). The court ordered that its mandate issue forthwith. On September 11, 1972, petitioner appeared before the grand jury and produced the documents required by the subpoena.

Petitioner contends that this Court should grant certiorari to resolve the question whether persons who incorporate their professional businesses under state professional service corporation laws may assert their Fifth Amendment privilege as to the corporate records. The controversy, however, is now moot.[3] Petitioner's argument to the contrary is largely predicated upon the erroneous assumption that his contempt adjudication was criminal in nature (see Pet., p. 12). To the contrary, the district judge's contempt order, which allowed petitioner to be relieved of the consequence of confinement by compliance with the order to produce the records, was not punitive but remedial, and as such constituted civil, not criminal, contempt. *Shillitani* v. *United States*, 384 U.S. 364, 368–372. Petitioner's reliance on *Sibron* v. *New York*, 392 U.S.

[3] *Dombrowski* v. *Pfister*, 380 U.S. 479 (Pet., p. 14) concerned continued "chilling" of First Amendment rights and is not apposite.

40, which deals with the continuing adverse consequences of criminal convictions is thus inapposite. In short, petitioner has chosen to comply with the district judge's order to produce the documents rather than continue to resist its legality, and there is no longer a true case or controversy sufficient to support review of the judgment of the court of appeals affirming the contempt commitment.

On the merits, the courts below correctly ruled that petitioner had no Fifth Amendment privilege as to the records of the corporation. This Court has consistently held that since "the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." *United States* v. *White*, 322 U.S. 694, 699; *Curcio* v. *United States*, 354 U.S. 118, 122; *Wilson* v. *United States*, 221 U.S. 361, 382–385. The rule has been applied even to a single shareholder corporation. *Grant* v. *United States*, 227 U.S. 74.* Although professional service corporations are in some respects different from other types of corporations—for example, in terms of personal liability of shareholders (see Pet., p. 10), and persons eligible to participate in such corporations—the records of such legal entities are not the private records of the individual

*See also *In re Mal Bros. Contracting Co.*, 444 F. 2d 613 (C.A. 3), certiorari denied, 404 U.S. 857, denying the right to invoke the Fifth Amendment privilege of a general partner as to partnership records.

members or shareholders of the organization and thus such members or shareholders are not entitled to invoke the Fifth Amendment privilege against their production by the corporation. See *United States* v. *White*, *supra*, 322 U.S. at 698–701; *Grant* v. *United States*, *supra*, 227 U.S. at 79–80.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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